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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re OGS Technologies, Inc.

Serial No. 76301434

Gene S. Winter of St. Onge Steward Johnston & Reens LLC for
OGS Technologies, Inc.

William H. Dawe, III, Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Seeherman, Chapman and Bucher, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On August 16, 2001, OGS Technologies, Inc. (a
Connecticut corporation) filed an application to register
on the Principal Register under Section 2(f) of the
Trademark Act, 15 U.S.C. §1052(f), the words SUPERIOR
QUALITY for "buttons for clothes" in International Class
26. The application is based on Section 1(a) of the
Trademark Act, 15 U.S.C. §1051(a), with applicant claiming
a date of first use and first use in commerce of 1985. The

specimen submitted with the application is one gold-colored metal button with SUPERIOR QUALITY printed in a circular manner on the back of the button. (The button is in a clear plastic bag with "Waterbury Companies, Inc." and other information printed thereon, as well as the hand written words "Production Samples.")

The application includes a declaration from Michael Salamone, applicant's president, that "the mark SUPERIOR QUALITY has become distinctive of Applicant's BUTTONS FOR CLOTHES by reason of the substantially continuous and exclusive use [of the mark on the goods in commerce] for at least fifteen years preceding the date of this statement [July 27, 2001]." Applicant claims ownership (by assignment) of Registration No. 2378234, issued August 15, 2000 on the Supplemental Register to Waterbury Companies, Inc., for the term SUPERIOR QUALITY for "buttons for clothes" with a claimed first use date of 1985.

Registration has been finally refused on the basis that applicant's showing with respect to its claim of acquired distinctiveness under Section 2(f) of the Trademark Act is insufficient and that the term remains merely descriptive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs.¹ Applicant did not request an oral hearing.

The Examining Attorney's position is that the proposed mark is a laudatory phrase which is merely descriptive of the quality and character of applicant's goods; that the proposed mark is highly laudatory/highly descriptive, thus requiring a higher burden of applicant in proving acquired distinctiveness; and that applicant's evidence does not establish acquired distinctiveness of the proposed mark for the goods.

The evidence supporting the Examining Attorney's position that the mark is highly descriptive and that applicant's evidence of acquired distinctiveness is insufficient, includes the following: (i) The American Heritage Dictionary (Third Edition 1992) definitions of "superior" as "of great value or excellence" and "quality" as "an inherent or distinguishing characteristic"; and (ii) printouts of numerous excerpted stories from the Nexis database and printouts of pages from several third-party websites, to show that the words "superior quality" are used in the clothing trade to refer to clothing and

¹ Different Examining Attorneys have been assigned at different times during the prosecution of this application.

clothing components such as fabrics, buttons and other notions that are of an excellent character. Examples of this usage include the following (emphasis added):

Welcome to Gator Trading Company
Needlework & Sewing Notions
Witch Steel Pins - Witch Steel Straight Pins...
Superior Quality Buttons & Belt Buckle...
www.pages.tias.com;

Headline: Getting In Line For A Shopper's Spree Of Sprees
...Designer Dress Days offers bargains on high-end goods. "Our goal is to offer **superior quality** clothing at an unmatched value, while earning the funds needed to support our many charitable projects," says Janet Aach, who with Marilyn Bennett is co-chair of this year's sale.
"The Plain Dealer," September 6, 2001;

Headline: P&G Grants Pampers License To Dana Undies
..."We are excited to join Dana Undies to offer **superior quality** clothing at a good value. ..."
"Chain Drug Review," July 17, 2000;

Headline: Plain-front Khaki Pants Latest in Male Casual Trend
...Prices range from under \$20 at discount stores to about \$120 for the finely tailored khakis in **superior-quality** brushed cotton milled in Italy and carried by better men's clothing stores.
"The Times Union (Albany, NY)," November 4, 1995;

Headline: Combining Forces For Special Needs
...Hendrickson has her biggest sale of the year today at the Depot in

Boulder... The clothing is **superior quality**, and you'll find some great deals at today's sale. ...
"Denver Rocky Mountain News," February 4, 1995;

Mulberribush boys **superior quality** 100% cotton shorts.
www.buyforkids.com;

Hickey-Freeman History
...The year was 1908 and the Hickey-Freeman Company was establishing a reputation as a producer of **superior quality** clothing for the modern businessman. ...
www.hickeyfreeman.com;

Dale of Norway
Superior quality hand-knitting yarns from the finest Norwegian wool since 1879 & authentic Norwegian designs based on elements from nature, as well as designs with a contemporary flair. Official licensee of the U.S. Olympic Committee, The Salt Lake Organization.
www.dale.no; and

QNSF carries a large selection of Notions, Fabric, Quilting Supplies, Books & Patterns. ... Fabrics of **superior quality** suitable for a variety of purposes... . Aside from our Fabrics we carry an extensive range of related accessories for Sewing, Patchwork and Quilting. ... Batting, ..., Books, Buttons, ...Patterns, Threads.
www.quiltsnsewforth.com.

Applicant contends that its mark SUPERIOR QUALITY has acquired distinctiveness and is entitled to protection under Section 2(f) of the Trademark Act.

The declaration of Michael Salamone submitted with the original application was quoted above. Following the first Office action rejecting applicant's evidence as insufficient, applicant submitted an additional declaration from Mr. Salamone, in which he avers that "OGS Technologies made first us [sic] of the trademark 'SUPERIOR QUALITY' on buttons for clothes at least as early as 1833";² that annual sales under the mark SUPERIOR QUALITY for buttons for clothes are over \$600,000 per year for the last five years (about 1998-2002) and advertising expenses are over \$60,000 per year for those five years; that he is not aware that the mark SUPERIOR QUALITY has been used by any other manufacturer, distributor or dealer; and that the mark is recognized in the trade and by consumers as denoting products of OGS Technologies, Inc.

The Examining Attorney rejected this evidence, stating that the reference to use in 1833 does not aver continuous use of the mark since 1833; and that large sales figures and advertising expenses do not necessarily establish acquired distinctiveness because the ultimate test in determining whether a designation has acquired distinctiveness is whether applicant's efforts have

² The Board presumes that applicant means that its predecessor(s) in interest made first use in 1833.

resulted in educating the purchasing public to associate the mark with a single source. The Examining Attorney, citing TMEP §1212.06(b)(3d ed. 2003), specifically explained as follows (Final Office action, p. 2):

The applicant has not submitted any advertising material or statements from purchasers establishing that the proposed mark is perceived as a mark. Thus, the examining attorney is unable to determine how the proposed mark is being used and whether it is perceived to be a source indicator by the consuming public.

The Examining Attorney also specifically invited applicant to submit additional evidence on the type and amount of its advertising of the mark and its efforts to associate the mark with the goods.

In a request for reconsideration, applicant submitted (1) printouts of the first twenty "hits" from a list retrieved by a Google search of the phrase "superior quality buttons,"³ for which applicant asserts that these references are all for applicant's product and all show the mark in capital letters or initial capital letters; (2) printouts from the websites of some of those first twenty "hits" on Google; and (3) four customer letters/statements.

³ This Google search indicated that 74,900 references were found.

Applicant argued that "Applicant's [sic] has made first use of the trademark SUPERIOR QUALITY at least as early as 1833 in conjunction with buttons on clothes" and "the buttons are well known among collectors and some of [the] buttons sell for hundreds and thousands of dollars each" (request for reconsideration, p. 3); that in view of applicant's use of the mark for 169 years and the level of sophistication inherent in purchasing applicant's buttons, purchasers have come to regard SUPERIOR QUALITY as identifying a source for the goods.

Excerpts from the printouts of pages from the Google search websites provided by applicant are set forth below:

Confederate States Central Government
Buttons

...

CS7A Sold W.Dowler/Superior Quality"
23mm \$1375

...

CS81A1 Sold "Superior Quality" 23mm
CS81B "Superior Quality" Scarcer die
pattern than 81A 23mm \$200

...

CS172A1 NEW Confederate Lined "I"
coat "Superior Quality." This one saw
service and shows some rippling to
face, yet very displayable. 23mm
\$200.

...

www.civilwarbuttons.com;

Neeley's Antiques
Buttons-Metal Commercial
V-1762 U.S. US Air Metal 2 Part
Brass Button. Soldered Loop Shank.

Marked 'SUPERIOR QUALITY' On Back. 5/8
in. Very Good Cond. Price: \$4.00

...

V-1335 POD Post Office Department 2
Part Brass Button. Marked 'SUPERIOR
QUALITY'. 15/16". Solid Metal Loop
Shank. Shows Some Wear. Price: \$4.00

...

V-1400 'FD' Fire Department 2 Part
Metal Button. Marked 'SUPERIOR
QUALITY.' 5/8". Plate Shows Wear.
Price: \$2.50

www.pages.tias.com;

Civil War Outpost
Civil War Buttons

...

BT-10 CSA Coat Button-non dug
Superior Quality back mark. \$185.

...

BT-16 Confederate CSA coat button-
Superior Quality back mark-
missing shank. \$165.

...

www.civilwaroutpost.com;

Stones River Trading Company
Non-Dug Confederate Buttons
Numbers Are From Albert's Record Of
American Uniform and Historical Buttons

...

NDC106. Lined CS127a1, Calvary, 2-
Piece With Border, 23mm Roman C, Full
Gilt, BM Superior Quality \$765.

...

NDC113. CS81b, Army General Service,
Two Piece With Border, 23mm, Full Gilt,
BM Superior Quality \$195.

...

www.stonesrivertrading.com;

Cordier Carpenter Antiques &
Collectables

...

Uniform Buttons

...

u44 Lg Vintage Kansas City, MO Fire Dept Button - Here's a nice uniform button from the Kansas City, Missouri Fire dept. Measures 1 inch wide and is in very good condition with a heavy metal loop shank. Backmarked "Superior Quality." Price: \$6.00

u44 Sm Vintage Kansas City, MO Fire Dept Button - Here's a nice uniform button from the Kansas City, Missouri Fire dept. Measures 9/16 inch wide and is in very good condition with a heavy metal loop shank. Backmarked "Superior Quality." Price: \$3.00

...

u43 Tennessee Militia Uniform Button - Here's a nice uniform button from the Tennessee Militia (this is a newer button). Measures 5/8 inch wide and is in very good condition with a heavy metal loop shank. Backmarked "Superior Quality." Price: \$3.00

...

www.pages.c-c-antiques.com/

Buttons & Badges

First, here is a note for button collectors new and old.

Waterbury Button Company is still in business and they are still making buttons. If they are marked on the back with Waterbury Co., you are safe. However, if they are marked with Waterbury Co's, these are newer reproductions. These have been made for a few years now and are showing up on several auction sites as "real" buttons. ... Waterbury Button Company states these are reproductions from the original molds. ...

...

Chesapeake and Ohio Small brass with
Superior Quality on the back.
Excellent condition. Price: \$5
www.pcisys.net; and

Civil War Uniform buttons

...

Civil War Era State of Mass. National
Lancers button. Excellent condition.
The shank is present and VERY slight
push on the backside. The back mark
reads "Superior Quality" Price: \$30.
www.civilwargalore.com.

All four customer letters/statements read as follows:⁴

Customer's Statement in Support of Distinctiveness

Sir:

I have been a customer of OGS Technologies, Inc., for
___ years and have purchased from them SUPERIOR QUALITY
buttons.

I regard the name SUPERIOR QUALITY as a trademark of
and identifying the products of OGS Technologies, Inc.
only, and not of any other company making these or similar
products.

Date: _____

By: _____

Name: _____

Title: _____

Company: _____

⁴ The four letters/statements are all on stationery with
letterhead reading:

OGS Technologies, Inc.

Divisions Waterbury Button Company

Diversified Eyelet Company

The Examining Attorney denied applicant's request for reconsideration, specifically addressing the new evidence submitted by applicant, and again pointing out that "applicant submitted no advertisements, no brochures, no catalogs, and no other promotional materials. (June 28, 2004 Office action, p. 1.)

With regard to the printouts of the first twenty "hits" on the Google search results summary, the Examining Attorney points out that, contrary to applicant's argument, not all twenty refer to applicant and not all utilize the designation "SUPERIOR QUALITY" in all capital or initial capital letters.

Regarding the printouts of pages from the websites referenced in the Google search summary, the Examining Attorney contends that none of the entries includes applicant's name; that applicant has provided nothing to put these entries into context such as information regarding the meaning of the term "back mark" for buttons; and that when the descriptions and depictions in the websites are taken in context they show that like other descriptive or laudatory phrases the wording "Superior Quality" is a "Back mark" denoting quality or is a "Quality Mark" and does not indicate the source of the buttons.

The Examining Attorney submitted the following definitions from The Collectors' Encyclopedia of Buttons (1992):

BACK MARK A term used for any stamping found on the back of buttons: words denoting quality such as Extra Rich or Superfine; manufacturers' names; uniform makers; stars, dots, eagles. The name of a known maker and recorded facts regarding his business career can be associated with contemporary activities and events to determine with reasonable accuracy just when a specific item was produced, and for what purpose. Even the lack of a back mark will often establish the period of use, since it was not until the early 1800's that button makers began to stamp firm names, trademarks, and other devices on backs. But there are exceptions to the helpfulness of back marks; sometimes the makers' names have been spelled incorrectly, or a motto does not seem to be related to the face die. See also Quality Marks; Registry Marks.

QUALITY MARKS A term used for certain words found on the backs of buttons made after 1800. It is believed the purpose of the words was mainly to promote sales, as the differences in quality can seldom be noted. Most of these marks appeared between 1800 and 1850. Examples are "Rich Gold," "Superior Quality," "Treble Gilt," "Gilt," and "Rich Orange."

REGISTRY MARKS Marks found on the backs of British-made buttons. They have been found on ceramic, glass, horn, and metal buttons. A registry mark is diamond-shaped, with letters or numbers at the points of the diamond. At the top point is an extra circle with a letter. The letters and numbers indicate the material, month, day, and year the button was registered, and the bundle inspected. See also, Back Marks.

In discussing applicant's four form customer letters/statements from Officers' Equipment Company, Men-Bell, C.A., Bende & Sons, Inc., and Naumo Corporation, the Examining Attorney contends that they are:

unverified statements that vary only by the number of years for which the signers indicate they've been applicant's customers. These unverified statements provide little helpful information. Only one provides even an address. None provide any background about what the companies do, make or sell. (June 28, 2004 Office action, p. 2.)

The Examining Attorney attached a printout of a full story retrieved from the Nexis database, dated May 1, 2000 appearing in "Bobbin" headlined "Waterbury Button Acquired by OGS Technologies."⁵

⁵ The article includes the following statements:

Waterbury Companies Inc. has sold the Waterbury Button Co., a 188-year-old button manufacturer to OGS Technologies, Inc., a group consisting of partners Robert Oppici, Sal Geraci and Mike Salamone, who together headed up the management team at Waterbury Button Co. prior to purchasing the company.

...
Today, in addition to producing buttons for the U.S. military, Waterbury creates products for state fire and police departments, airlines and the commercial uniform market, including customers from Disney to the Master's Golf Tournament. According to Oppici, the company, which has a fashion division that serves large customers such as Polo Ralph Lauren, Liz Claiborne, Donna Karan and Hartmarx, produces 85 percent of the buttons used in the commercial market.

(footnote continued)

In its brief on the case applicant argues that its evidence is sufficient to establish that its mark has acquired distinctiveness under Section 2(f) of the Trademark Act, specifically arguing that "Applicant has made substantially exclusive, extensive use of the Mark since 1833 in a manner that indicates its function as a trademark" (brief, p. 3); that applicant's long use (over 150 years) is a factor in determining acquired distinctiveness; that applicant's advertising expenses (\$60,000 per year for the last five years) and sales figures (\$600,000 per year for the last five years) illustrate the extent to which the trademark has been used; that there is no evidence that others use the mark SUPERIOR QUALITY on buttons; that "since 1833, consumers in the field of buttons have encountered the trademark SUPERIOR QUALITY used substantially as a trademark to denote the Applicant's goods" (brief, p. 6); that "consumers and experts in the field of buttons recognize that the trademark SUPERIOR QUALITY refers to Applicant's goods"

On the basis of the information in this article, the Examining Attorney contended, in denying applicant's request for reconsideration, that it is "telling" that applicant has provided no statements from such customers and has not provided any of applicant's own advertisements and promotional materials (including excerpts from applicant's website) in support of its claim of acquired distinctiveness. However, we do not draw any negative implication against applicant based on this Nexis story.

(brief, p. 6); and that collectors of military uniform buttons are very familiar with applicant's mark as evidenced by the printouts of pages from various websites.

Finally, applicant makes the following statement on page 8 of its brief:

Furthermore, it is important to note that Applicant's use of the mark dates back over 150 years. The common manner of trademark usage changes over time, and the backmark, which may not be considered a common trademark usage today was commonly used by manufacturers of that era to identify their goods to consumers. This is made clear by the number of backmarks from the Civil War buttons that feature the name of manufacturers.

In the Examining Attorney's brief, he points out that applicant does not dispute that SUPERIOR QUALITY is a generally laudatory term and is therefore merely descriptive of the goods. He also asserts that applicant has not submitted sufficient evidence to establish that this highly laudatory/highly descriptive term "superior quality" has acquired distinctiveness under Section 2(f) of the Trademark Act. Specifically, with regard to the evidence, the Examining Attorney contends that applicant has not claimed substantially exclusive and continuous use of the mark since 1833, only that the mark was used in 1833; that applicant has not amended its claimed first use and first use in commerce dates from 1985 to any other date

(e.g., 1833); that sales figures and advertising expenses are not alone determinative of establishing acquired distinctiveness; that there is no advertising material from applicant to determine how the mark is used by applicant and thus how it is perceived by consumers; that the four letters/statements from customers are not persuasive as they are unverified and provide no information as to who the customer companies are;⁶ that applicant's list of twenty "hits" from a Google search is not admissible evidence;⁷ that the full printouts from various websites have no evidentiary value as they may show use by others but they fail to show applicant's use of its mark, and they show use of the term SUPERIOR QUALITY on buttons from the civil war era, not use on buttons made by applicant since applicant's claimed date of first use of 1985; and finally, that the Examining Attorney's evidence shows that SUPERIOR QUALITY is only a back mark or quality mark for buttons and does not indicate the source of the buttons.

⁶ Trademark Rule 2.41(a) does not require that "letters or statements from the trade or public, or both" be in affidavit or declaration form.

⁷ This type of evidence (a Google search "hit" list) is admissible, although its probative value will vary depending on the circumstances of the case. See *In re Fitch IBCA Inc.*, 64 USPQ2d 1058 (TTAB 2002).

We begin by addressing the mere descriptiveness of the term "superior quality." Because applicant owns by assignment a Supplemental Register registration for the term SUPERIOR QUALITY for buttons for clothes, and because applicant now seeks registration on the Principal Register under Section 2(f), applicant has conceded that the applied-for mark SUPERIOR QUALITY is merely descriptive of the goods under Section 2(e)(1) of the Trademark Act. Moreover, all of the evidence regarding use of "superior quality" in relation to clothing, fabric, and notions shows that the term is highly laudatory/highly descriptive and is used to refer to the quality of these various items. Thus, the only issue before the Board is whether applicant has submitted sufficient evidence of acquired distinctiveness under Section 2(f) to overcome the mere descriptiveness of the mark.

Applicant has the burden of establishing that its mark has become distinctive. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988). The question of acquired distinctiveness is one of fact which must be determined on the evidence of record. As the Board stated in the case of *Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ2d 1996, 1999 (TTAB 1986):

[e]valuation of the evidence requires a subjective judgment as to its sufficiency based on the nature of the mark and the conditions surrounding its use.

There is no specific rule as to the exact amount or type of evidence necessary at a minimum to prove acquired distinctiveness, but generally, the more descriptive the term, the greater the evidentiary burden to establish acquired distinctiveness. See *In re Bongrain International (American) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, supra 6 USPQ2d at 1008. See also, 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§11:17 and 15:66 and 15:70 (4th ed. 2004).

In this case, the evidence clearly demonstrates that SUPERIOR QUALITY is a highly descriptive term and, therefore, the evidence necessary to demonstrate acquired distinctiveness is also extremely high.

Having carefully reviewed the evidence of record, we find that applicant's evidence to prove acquired distinctiveness is insufficient. Despite applicant's claim that the term was first used for buttons for clothes in 1833, there is a lack of evidence of recognition by the purchasing public now. Our determination of whether SUPERIOR QUALITY has acquired distinctiveness is based on

the perception of the purchasing public today. Thus, although applicant (through a predecessor) may have begun using the term SUPERIOR QUALITY on buttons in 1833, applicant has not presented sufficient evidence of recognition of SUPERIOR QUALITY as a trademark by the purchasing public at the present time.

Sales of \$600,000 per year for five years (covering about 1998-2002) are not particularly large sales figures and advertising expenses of \$60,000 per year for that time frame are likewise quite limited in amount. That is, these figures do not appear to be particularly substantial on their face. Certainly, applicant has not placed those figures in context, e.g., total sales of buttons in the United States, or the market share for buttons sold under this proposed mark, to show that these sales figures are significant. Thus, given the high degree of descriptiveness of the term, a more substantial showing of sales and advertising figures would be required to establish acquired distinctiveness. See *In re Leatherman Tool Group Inc.*, 32 USPQ2d 1443 (TTAB 1994).

Despite the Examining Attorney's repeated suggested requests that applicant submit its advertisements and uses of the term to show how the term is used and promoted by applicant, applicant did not provide any advertisements,

promotional brochures, packaging or the like. Thus, we cannot determine if the \$60,000 spent on advertising each year between 1998 and 2002 has caused SUPERIOR QUALITY to be recognized as a trademark. Nor can we determine whether, as used, consumers would regard SUPERIOR QUALITY as merely an indication of quality, and look to another mark on applicant's packaging as indicating the source of the buttons.

The four letters/statements are of limited probative value. The letters are on applicant's letterhead, rather than that of the customers. Although the letters identify the signers as presidents of their respective companies, there is no information in the record regarding these companies. We do not know, for example, whether they sell buttons to the public or to clothing manufacturers, or whether they use buttons for their own goods. Nor do the letters provide any information about the number of buttons that they purchase. Simply put, these four letters, with their minimal information, fall short of demonstrating that a substantial number of consumers would regard the highly descriptive term "superior quality" as a trademark. See *In re Paint Products Co.*, 8 USPQ2d 1863, 1867 (TTAB 1988).

This brings us to a consideration of the website evidence, and applicant's statements that its buttons are well known among collectors.

First, we note that the Google summary of search results ("hits") is of limited probative value, as it shows only truncated uses of the term "superior quality." Further, the summary can, at best, be considered to be of mixed uses. As noted earlier in our decision, not all of the twenty "hits" refer to applicant, nor do they depict "superior quality" with capital letters. (For example, "5. Canadian Buttons - Our Difference ... At Canadian Buttons Limited we recognize the importance of superior quality..."; "18. Avanti Order Form... Eurpoa Golf Shirt Pique cotton, superior quality, premium weight with pearl buttons..."; "6. Castiglione Accordions: Scandalli Accordions...Treble registers Plus Master 9 Brass Registers Superior Quality... Genuine Hand Made The Chromatic Buttons Accordions are..."; "8. USDA Forest Service Uniform Buttons: Metal and Ivory Types ...Backs: Variety 1= 'EXTRA QUALITY', Variety 2= 'SUPERIOR QUALITY', Variety 3= no words...".)

The printouts of pages from various websites also show mixed uses. For example, the listing at www.civilwarbuttons.com referencing "CS81A1 Sold "Superior Quality" may refer to the condition of the button. We do

recognize that several of the references indicate that the words "SUPERIOR QUALITY" are found on buttons which, judging from the excerpts, are offered to collectors of Civil War and other uniform buttons. These excerpts refer to "SUPERIOR QUALITY" as a back mark which, as the Examining Attorney's evidence shows, is a term used for any stamping found on the back of a button, and does not necessarily indicate a trademark. In fact, the definition provided by the Examining Attorney specifically states that a back mark may simply be used to indicate quality. Thus, we cannot conclude from the website evidence that SUPERIOR QUALITY is recognized as a trademark for buttons.

Moreover, even if collectors of Civil War era (and other such) buttons may regard SUPERIOR QUALITY as a trademark for buttons used at the time of the Civil War, nonetheless, there is no evidence that consumers regard SUPERIOR QUALITY as a trademark for buttons today. Further, there is no evidence that button collectors form a significant portion of the relevant purchasing public for applicant's identified goods "buttons for clothes." Stated another way, even assuming, arguendo, that SUPERIOR QUALITY was viewed as a trademark for buttons for military uniforms during the mid-nineteenth century (and that is not established in this record), or that collectors today would

recognize SUPERIOR QUALITY as a trademark that was used in that time period, this is not relevant to the issue before the Board today.

As applicant concedes in its brief (quoted earlier herein), trademark usage changes over time and what was once considered a trademark may not be recognized as such today. As stated previously, the Board must determine whether applicant has established acquired distinctiveness of its applied-for mark based on consumer perception today. The question of whether SUPERIOR QUALITY was recognized as a trademark for buttons for clothes in earlier times, is a question we need not reach.

A predecessor Court to our primary reviewing Court pointed out in *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 213 USPQ 9, 13 (CCPA 1982), "that trademark rights are not static and that the right to register must be determined on the basis of the factual situation as of the time when registration is sought."

Applicant has not established that, at the present time, the highly laudatory and therefore highly descriptive term SUPERIOR QUALITY has acquired distinctiveness as a mark for buttons for clothes.

We note for the record that applicant has not argued that its ownership by assignment of a prior registration

(No. 2378234) establishes acquired distinctiveness.

Inasmuch as the registration is on the Supplemental Register, any such argument would have been unavailing. See Trademark Rule 2.41(b).

In conclusion, we find that applicant's evidence is insufficient to establish acquired distinctiveness in the highly laudatory/highly descriptive term SUPERIOR QUALITY for the identified goods. See *In re Boston Beer Co. L.P.*, 198, F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Bongrain International (American) Corp.*, supra; *In re Duvernoy & Sons, Inc.*, 212 F.2d 202, 101 USPQ 288 (CCPA 1954); *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); and *In re Redken Laboratories, Inc.*, 170 USPQ 526 (TTAB 1971).⁸

Decision: The refusal to register on the Principal Register on the basis that applicant's mark is merely descriptive under Section 2(e)(1) and that applicant has failed to prove the applied-for mark has acquired

⁸ Applicant cited *In re Mine Safety Appliances Co.*, 66 USPQ2d 1694 (TTAB 2002) wherein the Board held the mark WORKMASK for "safety equipment, namely, self-contained breathing apparatus" to be merely descriptive under Section 2(e)(1), but that applicant had met its burden in establishing acquired distinctiveness under Section 2(f). The facts of this cited case (e.g., the nature of the mark as well as the overall evidence of distinctiveness presented therein), are readily distinguishable from the case now before us.

Ser. No. 76301434

distinctiveness under Section 2(f) of the Trademark Act is affirmed.